United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

287

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,596

ELROY LEWIS,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

Appeal from a Judgment of the United States
District Court for the District of Columbia

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October 29, 1968

QUESTIONS PRESENTED

1. Whether a mere "inarticulate hunch" on the part of the arresting officers satisfies the constitutional requirement of probable cause for an arrest without a warrant.

2. May a conviction in a capital case be upheld where the defendant asked for but was denied his absolute statutory right to two counsel on his behalf.

3. Has the accused been accorded due process of law, with regard to his appearance before a police line-up, when the witnesses appearing at the line-up have discussed the crime with the police before the line-up and discuss the identity of the accused between themselves?

4. Should a judgment of acquittal be entered when the testimony adduced at the trial, taken in its entirety, presents conflicts in the narrative of the case to the point that the jury is reduced to speculation?

5. Is it reversible error for the court not to instruct the jury in the elements of the crime of second degree murder when there is evidence before the court that a homicide topk place, and, from the manner of the commission of the homicide, malice can be inferred?

6. Do the government attorney's remarks in his closing argument strangely hinting about the fact that the accused did not take the stand in his own defense constitute reversible error?

[redacted]

This case has not previously been before this Court.

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JURISDICTIONAL STATEMENT

Appellant appeals from a conviction in the United States District Court for the District of Columbia of the crimes of murder in the first degree (22 D.C. Code §2401), robbery (22 D.C. Code §2901), unauthorized use of vehicles (22 D. C. Code §2204) and carrying concealed weapons (22 D. C. Code §3204).

STATEMENT OF FACTS *

On April 5, 1966, at about 3:50 P. M., Louis Brodsky was pronounced dead by Marion Mann, the then Deputy Coroner of the District of Columbia. (Tr. 49). Mr. Brodsky was so found at the place of his business, Edgewood Liquors, 2304 Fourth Street, N. E., Washington, D. C. No eyewitnesses are known at this time. The perpetrators of the crime are therefore the only living human beings with actual knowledge of the person or persons who accomplished this deed.

The first persons who happened on the scene were Alonzo Lewis and his wife, Arvia Lewis. Mr. and Mrs. Lewis (no relation to the Appellant), were staying near the Edgewood Liquors, on Channing Street, Northeast, on April 5, 1966. Mr. Lewis, in his testimony, was vague, however, about the time that he happened to leave his Channing Street, N. E., residence and proceed to the liquor store. As a matter of fact, his first testimony was that he left his residence to pick up a newspaper about 11:00 A. M. (Tr. 68-71). Upon persistent questioning by the Assistant United States Attorney, Mr. Lewis

* Throughout this brief, the transcript of the hearing on the Motion to Suppress will be cited "Mot. Tr."; the transcript of the trial will be cited "Tr."; the grand jury transcript will be cited "Gr. J. Tr." the sentencing transcript will be cited "Sen. Tr."

agreed that the time that he arrived at the Edgewood Liquors, to purchase a newspaper, was about 3:00 P. M. (Tr. 71). Mr. Lewis further stated that, about 80 yards from the entrance to the liquor store, he saw a car parked near the curb, with three males in it. (Tr. 73). On the way into the store, Mr. Lewis was met at the entrance by a man with a mask and a gun, who told him, "Get back or I will blow your _____ _____ head off." (Tr. 73). Mrs. Lewis' testimony is substantially the same to this point of the narrative of the case, with the addition of the fact that her description of the man coming out of the store was "a big man." (Tr. 216).

Mr. and Mrs. Lewis both also concur on the actions of the man after he brushed by them: he walked toward the parked car. (Tr. 75 and 217). However, at this point, the Lewises also give varying testimony concerning the man's actions after he reached the car. Mr. Lewis states, (Tr. 74), that he went as far as the car and then came back, toward the couple. Mrs. Lewis states (Tr. 217), "that she watched the man walk to the car and he got into the car, and he leaned over; and he turned around. He shut the car door and he started back toward us."

The Lewises then went to a nearby gas station and notified the police of the events they had just witnessed. Scout 121, containing Police Privates Jesse L. Anderson (driving) and Richard L. Hamilton (manning the radio in the cruiser), responded to the call over police radio, sent at 3:01 P. M.: "Scout 121, a robbery holdup. Fourth and Rhode Island." (Tr. 1120). Scout 121 was in the 2200 block of North Capitol at the time, and proceeded to the Edgewood Liquor store via Michigan Avenue and Franklin Street. (Mot. Tr. 51). In the 2300 block of Fourth Street, the cruiser came upon James Taylor. The police stopped, picked up Taylor. After being picked up, Taylor related to Private Hamilton that there were five Negro subjects heading toward Bryant Street from the Edgewood Liquor store in a greenish-blue Chevrolet, according to the testimony of Private Hamilton at the hearing on the Motion to Suppress. (Mot. Tr. 91). However, Private Hamilton's contemperaneous statement of facts, recorded and dated April 5, 1966, only indicates that Taylor informed Hamilton that "it is a green Chevrolet," with no partial or other kind of description of the suspects. (Mot. Tr. 95). Private Anderson also testified that there was no description of the suspects over the radio, (Mot. Tr. 58), and that he was not sure whether witness

Taylor described to Privates Hamilton and Anderson the suspects, either as to race or number (Mot. Tr. 61, 62).

As the cruiser proceeded southwesterly on Rhode Island Avenue, Northeast, and passed V Street, Northeast, the officers and Taylor noticed a green Chevrolet near the intersection of Rhode Island and Lincoln Road, (Mot. Tr. 64), but none of the men in the cruiser saw any people near the car. As the cruiser started to turn toward Lincoln Road, Private Hamilton noticed four suspects on the northwest side of Lincoln Road, and asked witness Taylor, "Is that them?", to which Taylor replied, "Yes, that is them." Anderson stated that he had not had time to ask for any further description of the suspects than related above because only four minutes elapsed from the time of the initial radio dispatch, (3:01 P. M.), to the time that Private Anderson advised the radio dispatcher that an arrest had been made (3:05 P. M.) (Mot. Tr. 69).

Acting on the information available to them at the time, Officers Anderson and Hamilton made their arrest of the suspects at 3:05 P. M., when the officers emerged from the cruiser and informed the suspects they were under arrest (Tr. 478). Searching the suspects, Officer Hamilton testified that he recovered the following from the person of Elroy Lewis: a black ski mask

(Tr. 480); $90.00 in bills (Tr. 482); a .38 caliber shell (Tr. 486); a green rubber glove (Tr. 487); a roll of tape (Tr. 517); and a pair of brown work gloves (Tr. 493). Further, Officer Anderson testified that while searching the men near Elroy Lewis, he noticed Elroy take his hands down from the car where the police had ordered them to be placed while the search was being administered to the suspects. (Tr. 483-484):

> "One was on the door and the other hand had come from within his midsection, and the arm was inside the car door. He released an object and I heard it hit the floorboards of the car with a thump."

However, when Officer Hamilton filled out his police report, he failed to include the fact that he had recovered the .38 caliber bullet and the pair of brown work gloves (Tr. 518).

Mr. Taylor died sometime between the preliminary hearing and the Motion to Suppress Evidence, argued on November 18 and 21, 1966. The most accurate representation of what Taylor told the police, appellant Elroy Lewis contends, is what Private Anderson recorded in his contemperaneous statement of facts in the case. In his statement the only information which he mentions as coming from Taylor is that a green Chevrolet was involved. Taylor never gave Officer Anderson a description of the suspects, nor did he have an accurate estimate of their number. (Mot. Tr. 61).

Attracted by the commotion resulting from the arrest of the four men, Mrs. Julia Warren observed the scene from her vantage point on the second story of her house directly above the arrest scene at 54 Rhode Island Avenue, N. E., on the corner of Rhode Island Avenue and Lincoln Road, Northeast. (Tr. 720). She also observed one of the suspects moving his hands on and off the car during the search, and observed him open the door of the car then throw a gun inside (Tr. 721, 722). Mrs. Warren identified Elroy Lewis as the suspect who acted in this fashion (Tr. 723). Her identification was based on Elroy's position with relation to the other suspects, and the fact that, when she informed the arresting officers of her observations, they asked her to designate the man whose actions she observed. The identification was made by Mrs. Warren when she came out on the street to tell the arresting officers of her identification. (Tr. 725).

Subsequent to the arrest of the suspects, both Mrs. Warren and the Lewises were transported to police headquarters, where they viewed a lineup including the two defendants to this action. Lieutenant Wallace, assigned to the robbery squad, was assigned the task of accompanying Mrs. Warren at the lineup. (Tr. 94). Sergeant Wilson of the homicide squad was given the job

of staying with the Lewises at the lineup. (Tr. 111). Although Sergeant Wilson maintained that there was a seat separating Mr. and Mrs. Lewis, (Tr. 111), Mrs. Lewis stated, unequivocally, that there was no seat separating them. (Tr. 148). Further, Mrs. Lewis stated that she and her husband discussed the identity of the various persons in the lineup. (Tr. 152). It was only after this discussion that the Lewises arrived at an agreement concerning the identity of the man sitting on the driver's side of the car near the Edgewood Liquor store. (Tr. 155). The trial judge stated that, in spite of the discussion between the Lewises, each of them was able to make up his or her own mind with regard to the identification of the man designated as coming out of the store and the man sitting on the driver's side of the car. (Tr. 169 C). Appellant Elroy Lewis properly noted his objection to this ruling at this point.

Mrs. Julia Warren was transported to the lineup attended by the Lewises also. She was taken there in a separate police car and she was briefed on the nature of the crime while proceeding to the Number One Precinct Station House. (Tr. 127). Mrs. Warren testified, at the hearing on the lineup, that she could not hear what the Lewises said about the suspects in the lineup, but she

did say that she was separated from the Lewises by only a few feet. (Tr. 136). In addition, although Mrs. Warren was not told who the individual suspects were that she was to view in the lineup, she was told by Detective Wallace that she was to look for the man who had thrown the gun in the car. (Tr. 129).

At trial, a great many inconsistencies regarding the evidence against Elroy Lewis were shown. Mrs. Arvia Lewis stated unequivocally, on direct, that the Number 2 man in the lineup was the man behind the wheel of the car, (Tr. 259) but on cross, (Tr. 261), she testified that her real impression of her identification of appellant Elroy Lewis was that she "thinks" he is the driver. Further, Mrs. Lewis, in her grand jury testimony, stated that Elroy Lewis was the man coming out of the liquor store when she and her husband approached the entrance to the store. (Tr. 818). Her grand jury testimony identified Elroy Lewis by his picture in the paper and by his name (Gr. J. Tr. p. 26). Finally, when Mrs. Arvia Lewis gave her contemperaneous statement to the police before the lineup on April 5, 1966, she placed Elroy Lewis in the car as the driver. Because of the great variation in size between appellant Elroy Lewis and appellant Bobby Lewis, counsel for appellant Elroy Lewis submits that such an inconsistency in testimony shows a genuine doubt in the mind of this most important witness about the identity of the men involved in this crime.

Private Richard Hamilton, the police officer accompanying Private Anderson in Scout Car 121, and an officer performing much of the initial processing of the suspects at the location where they were apprehended, prepared a statement of his activities on the day of arrest, April 5, 1966. (Tr. 516, 517). However, in his statement, Government Exhibit Number 22, Officer Hamilton failed to include the fact, as he testified at trial, (Tr. 487, 493), that he recovered a live .38 caliber round, a can of tape, a pair of brown working gloves and a single green glove. (Tr. 513). Further, although Officer Hamilton stated that the brown gloves and the green glove were recovered from Appellant Elroy Lewis, Officer Crooke, the detective sergeant who accounted for the custody of all government exhibits, in a contemporaneous report, states otherwise (Tr. 911).

Private Anderson filled out a separate statement, listing his activities on April 5, 1966. This statement was dated April 5, 1966, and was introduced as Government's Exhibit Number 30. (Tr. 567). Although this exhibit plainly included this statement:

> "My partner searched these subjects for weapons and recovered a revolver from the biggest of the four subjects and a second revolver was also recovered by Private Hamilton from the hold-up man's auto a few minutes after the arrest."

Officer Anderson denied that he made such a statement on cross-examination. (Tr. 570).

Further, Julia Warren testified, on cross-examination, that she observed the entire procedure of the search of the suspects, except for the few seconds it took her to come from her position above the arrest scene to the point on her porch where she summoned one of the arresting officers to give him information about her observations. (Tr. 743-744). Yet, during this entire time, she did not observe anything taken from the person of Elroy Lewis. (Tr. 743). More important, however, is the fact that although Mrs. Warren stated that she observed appellant Elroy Lewis remove a gun from his midsection, open the door of the car and throw the gun inside the car, (Tr. 721, 722), one of the police officers actually patting the men down, three feet from Elroy Lewis, Private Richard Hamilton, neither saw nor heard the car door open. (Tr. 513). In addition, assuming that Elroy Lewis did fling the gun through the car door, as Mrs. Warren described, he would not have had time to ensure that all fingerprints were wiped from the gun. His fingerprints should have been on the gun, according to Mrs. Warren's testimony because she testified that he was not wearing gloves when she saw him. (Tr. 742). Yet the government stipulated, (Tr. 824) that no identifiable prints were found on any of the evidence submitted to the Identification Section of the Metropolitan Police Department, in other words, on the gun allegedly thrown by Appellant Elroy Lewis into the towed car.

Appellant Elroy Lewis was indicted on June 14, 1966. A motion to Suppress Evidence, based on the allegations that appellant was arrested without a warrant and without probable cause, was argued on behalf of the appellant. After the hearing on the motion, including the testimony of the arresting officers in the case, the Honorable Judge Bryant denied the motion to suppress evidence on February 28, 1968. The testimony of the officers at the hearing on the motion to suppress was substantially the same as that introduced at the trial of the case. During the first stage of the trial, a hearing on a motion to suppress outside of the presence of the jury was held on the lineup conducted utilizing the four suspects and three other Negro men from the U. S. District Court Cell Block. (Tr. 00 through 169C). After hearing all of the evidence with a direct bearing on the lineup, including the testimony of Alonzo Lewis; Arvia Lewis; Julia Warren; and Officers Burke, Wallace and Wilson; Judge Robinson ruled that the lineup procedure followed in the instant case did not fall within the purview of the Gilbert case, Gilbert v. United States, 366 F. 2d 923 (1966) (Tr. 169-A, 169-B). Appellant Elroy Lewis duly noted his objection to the ruling of the Court here.

In the final argument, in rebuttal, Assistant United States Attorney Victor Caputy discusses, (Tr. 1391-1394), the statement of counsel for Appellant Bobby Lewis that appellants were looking for work in the vicinity of Edgewood Liquor store on the day of the crime. Mr. Caputy points out the fact that Mrs. Bethea's testimony concerning the appellant's activities is "irrefutable and uncontradicted." Mr. Caputy did not make the specific statement here that appellants failed to take the stand. However, it is obvious that the only person or persons who could refute or contradict Mr. Bethea's testimony is either Elroy or Bobby Lewis.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Const., Amend. V:

". . . nor shall any person . . . be compelled in any criminal case to be a witness against himself . . . "

22 D. C. Code § 2204

"Any person who, without the consent of the owner, shall take, use, operate, or remove, or cause to be taken, used, operated, or removed from a garage, stable, or other building, or from any place or locality on a public or private highway, park, parkway, street, lot,

field, inclosure, or space, an automobile or motor vehicle, and operate or drive or cause the same to be operated or driven for his own profit, use, or purpose shall be punished by a fine not exceeding one thousand dollars or imprisonment not exceeding five years, or both such fine and imprisonment."

22 D. C. Code § 2401:

"Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402, rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree."

22 D. C. Code § 2501:

"Every person who, having taken an oath or affirmation before a competent tribunal, officer, or person, in any case in which the law authorized such oath or affirmation to be administered, that he will

testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully and contrary to such oath or affirmation states or subscribes any material matter which he does not believe to be true, shall be guilty of perjury; and any person convicted of perjury or subornation of perjury shall be punished by imprisonment in the penitentiary for not less than two nor more than ten years. Any such false testimony, declaration, deposition, or certificate given in the District of Columbia, but intended to be used in a judicial proceeding elsewhere, shall also be perjury within the meaning of this section."

22 D. C. Code § 2901:

"Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years."

22 D. C. Code § 3204:

"No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years."

STATEMENT OF POINTS

I. The trial court erred in finding that when appellant was placed under arrest that there was probable cause for that arrest. With respect to Point I, appellant desires the Court to read the following pages of the reporter's transcript: Transcript of Motion to Suppress, pp. 3-106.

II. The trial court erred in admitting into evidence the lineup identification testimony of three witnesses, two of whom had discussed the appearance of the appellant, and all of whom had been thoroughly briefed on the purpose of the lineup. With respect to Point II, appellant desires the Court to read the following pages of the reporter's transcript: Transcript of Proceedings, pp. 30-169 C.

III. The trial court erred in refusing to direct a judgment of acquittal because there was conflicting and insufficient evidence to implicate the appellant with the commission of the crimes that he is charged with. With respect to Point III, appellant desires the Court to read the following pages of the reporter's transcript: Transcript of Proceedings, pp. 258-261, 516-518 and 911, 567-570, 742-744 and 721-722, 513, 742 and 824.

IV. The trial court erred when it failed to instruct the jury on the elements of second degree murder, in view of the evidence against the appellant in this case. With

respect to Point IV, appellant desires the Court to read the following pages of the reporter's transcript: Transcript of Proceedings, pp. 1217-1219.

V. The trial court erred in not declaring a mistrial when the prosecutor remarked, in effect, during the closing argument of the defense that neither of the defendants had taken the stand during the trial. With respect to Point V, appellant desires the Court to read the following pages of the reporter's transcript: Transcript of Proceedings, pp. 1391-1394.

VI. The court below committed reversible error in denying Appellant's motion for the appointment of additional counsel. With respect to Point VI, appellant desires the Court to read the following page of the reporter's transcript: page 325.

SUMMARY OF ARGUMENT

I

At the time that appellant was placed under arrest, the arresting officers, having neither a description of the suspects, nor an indication of their number, nor an actual nexus with the one fact reported to them by witness Taylor, the color of the getaway car, did not have probable cause to arrest appellant. Beck v. Ohio, 379 U. S. 89, 91 (1964).

II

If witnesses to the crime have been briefed concerning the identity of the individuals appearing in the lineup, and, during the appearance at the lineup, the witnesses discuss the appearance of the witnesses and decide which person of the seven appearing is actually implicated in the crime, the accused has not been accorded due process of law with regard to the lineup procedure. Gilbert v. United States, 366 F. 2d 923 (1966).

III

When the testimony adduced at trial, taken in its entirety, presents conflicts in the narrative of the case to the point that the jury is reduced to speculation, a

judgment of acquittal may be entered for the defendant. Curley v. United States, 81 U. S. App. D. C. 389 (1947); Hiet v. United States, 124 U. S. App. D. C. 313 (1966).

IV

When there is evidence before the court that a homicide took place, and from the manner of the commission of the homicide malice can be inferred, it is reversible error for the court not to instruct the jury in the elements of the crime of second degree murder. Goodall v. United States, 95 U. S. App. D. C. 140 (1956).

V

Prosecutor's remarks concerning the failure of the defendants to take the stand, mentioned during the final arguments to the jury, standing alone, constitute reversible error. Garris v. United States, Criminal Number 21142, U. S. App. D. C., February 14, 1969.

VI

The Court below committed reversible error in denying appellant's motion for the appointment of additional counsel. Smith v. United States, 122 U. S. App. D. C. 300, 353 F. 2d 838, 845 (1965), cert. denied, 384 U. S. 910, 974, 86 S. Ct. 1350, 16 L. Ed. 2d 362 (1966), (emphasis supplied).

ARGUMENT

I. THERE WAS NO PROBABLE CAUSE TO ARREST THE APPELLANT.

Appellant Elroy Lewis hereby adopts, by reference and in its entirety the arguments of the counsel for Bobby Lewis pertaining to this point.

II. THE LINEUP CONTAINING THE APPELLANT ELROY LEWIS DID NOT ACCORD HIM DUE PROCESS OF LAW.

The Courts have recently scrutinized police line-ups since the U. S. Supreme Court decision of Stovall v. Denno, 388 U. S. 293 (June 12, 1967). This case laid down the proposition that a pretrial confrontation between witness and defendant may be "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to amount to a denial of due process of law. The Honorable Oliver Gasch, in United States v. O'Connor, 96 Wash. Law Rep. 689 (Decided, April 9, 1968), had an occasion to summarize the state of the District of Columbia law since the Stovall decisions:

> "Stovall, United States v. Wade [388 U. S. 218 (1967)], and Gilbert v. California [388 U. S. 263 (1967)], all published on the same day, comprise a trilogy which indicates the concern of the Supreme Court over 'line-up' and 'show-up' procedures that might lead to mistaken identification of a suspect by a witness who is prejudicially amenable to the power of suggestion. Wade and Gilbert establish a right to counsel at pre-trial confrontations and although the extent of this right in particular circumstances has yet to be authoritatively determined, it is clear that these two cases

do not have retroactive application. There is no question of the retroactivity of Part II of Stovall, however, for the due process concept there enunciated is an integral part of our criminal jurisprudence. The impact of Stovall, therefore, has manifested itself not in the creation of new law but rather in a re-evaluation of traditional due process concepts with a view toward contemporary law enforcement practices."

Although the Gasch decision in the O'Connor case dealt with a situation where a witness is confronted with one suspect, appellant here contends that the further requirement is well stated by Judge Gasch, not only in a situation where one defendant is shown to a witness, but where any line-up is questioned:

"Since the Stovall decision, this jurisdiction has had the benefit of two appellate opinions on the issue, Wise v. United States, 393 F. 2d 266 (1967), and Wright v. United States, U. S. App. D. C. No. 20,153, January 31, 1968, 36 W. L. R. 341. The first of these cases, Wise, established the proposition that where the confrontation occurs proximate to the scene and time of the offense as well as the arrest, and in the absence of other aggravating factors which might increase the possibility of a mistaken identification, presentation of a single suspect to a witness for purposes of identification does not 'diverge from the rudiments of fair play that govern the due balance of pertinent interests that suspects be treated fairly while the state pursues its responsibility of apprehending criminals.' Wright involved a confrontation between witness and suspect at a police station. Speaking for the majority, Judge Robinson refused to rule on the merits of the Stovall challenge without amplification of the record as to pertinent facts. In remanding the case, however, the majority indicated the particular nature of some of the missing data. Therefore, with these cases in mind, the Court concluded that the following factors are relevant in determining whether a pre-trial confrontation between a suspect and the identifying witnesses was 'so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law.'"

Appellant Elroy Lewis sees no reason why the standards listed following should not also apply to his situation:

"1. Was the defendant the only individual that could possibly be identified as the guilty party by the complaining witness, or were there others near him at the time of the confrontation so as to negate the assertion that he was shown alone to the witness?

"2. Where did the confrontation take place?

"3. Were there any compelling reasons for a prompt confrontation so as to deprive the police of the opportunity of securing other similar individuals for the purpose of holding a line-up?

"4. Was the witness aware of any observation by another or other evidence indicating the guilt of the suspect at the time of the confrontation?

"5. Were any tangible objects related to the offense placed before the witness that would encourage identification?

"6. Was the witness' identification based on only part of the suspect's total personality?

"7. Was the identification a product of mutual reinforcement of opinion among witnesses simultaneously viewing defendant?

"8. Was the emotional state of the witness such as to preclude objective identification?

"9. Were any statements made to the witness prior to the confrontation indicating to him that the police were sure of the suspect's guilt?

"10. Was the witness' observation of the offender so limited as to render him particularly amenable to suggestion, or was his observation and recollection of the offender so clear as to insulate him from a tendency to identify on a less than positive basis?"

The trial court, in essence, held that the criterion for a due process lineup were met in the case of the appellant Elroy Lewis. However, taking the applicable criterion-factors in the order listed, appellant contends that:

4. This factor was important to appellant Elroy Lewis' case because both Mr. and Mrs. Lewis and Mrs. Warren testified that they not only were transported to police headquarters in police cars, but that once there, they were "interviewed" by police officers until the arrangements had been made for the line-up;

7. Mr. and Mrs. Lewis discussed, at some length, appellant Elroy Lewis' appearance at the lineup. Further, Mrs. Lewis agreed that she made up her own mind about the man she saw coming out of the store, but only after Judge Robinson asked her specifically about this at the line-up hearing.

8. Mrs. Warren had related to the police officer accompanying her, Lieutenant Wallace, that she was scared of the Lewises. This poses a question about the objectiveness of her observations at the line-up which should be considered by this court;

9. Although the appellant has no record of the conversations between the police with Mr. and Mrs. Lewis

and Mrs. Warren, between the time that they were picked up at the scene of the crime and the scene of the arrest, respectively, and the time of the line-up, it is more than pure conjecture that during this period on April 5, the police discussed in great detail, the case and evidence against the suspects, with these witnesses.

Appellant submits that the Wade and Gilbert decisions will not affect his case, since the line-up in question occurred before these decisions. However, in view of the holding in Stovall, Wade and Gilbert, this court should scrutinize the line-up here to ensure that appellant Elroy Lewis appearing at the line-up without an attorney was accorded due process in the light of the requirements laid down in the Wise case. This is especially important when it is recalled that Mrs. Warren, the witness whose testimony tied Elroy Lewis to the murder weapon, attended this tainted line-up.

III. THE TESTIMONY ADDUCED AT TRIAL PRODUCED SUCH CONFLICTS IN THE CASE THAT THE JURY WAS REDUCED TO SPECULATION AND A JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN ENTERED, OR, IN THE ALTERNATIVE, THE CASE SHOULD BE REMANDED FOR A NEW TRIAL.

Key witnesses, relied on by the prosecution to tie appellant Elroy Lewis to incriminating, circumstantial evidence were shown, on cross examination to have inconsist-

ent and conflicting testimony, when viewed in its entirety. Thus, Mrs. Arvia Lewis, stated, in her statement at the line-up on April 5, 1966, that she thought Elroy Lewis was the driver of the car, but she also testified that some other man could have been the driver. Some inconsistency in testimony is allowable and, indeed, is acceptable at any criminal trial. However, appellant Elroy Lewis contends such a recantation by this witness, among: the version given in her contemperaneous statement of April 5, 1966; her testimony before the grand jury; her testimony at trial; are so conflicting, so varied, as to approach perjury under the District of Columbia Code, Section 22-2501.

Further, the officer that searched and, following the search, removed items from appellant, Private Hamilton, included some, but not all of the items in his report that he testified that he removed. The four items not included in the report were extremely damaging to the appellant's case, however: one, a roll of tape in a tin; two, a live .38 caliber bullet; three, two brown cotton gloves; four a green rubber glove. This inconsistency must, of necessity, leave the jury to speculation about what the actual facts were, viz., what articles Officer

Hamilton actually removed from Elroy Lewis, as his hands rested on the towed car. The confusion is further compounded when Officer Crooke testifies that the gloves, according to the information given to him on April 5, 1956, were found on Lincoln Road and Rhode Island Avenue, N. E. Also, Mrs. Warren, who observed the entire arrest episode except for the few seconds that it took to descend the stairs to the ground floor of her house and emerge from the house, saw nothing taken from the person of Elroy Lewis.

In two cases before the U. S. Court of Appeals for the District of Columbia, nineteen years apart, this Court has pronounced the standards to be followed by a court when inconsistencies are found in the testimony of witnesses and conflicts are shown between the testimony of different witnesses. In Curley v. United States, 81 U. S. App. D. C. 389 (1947), Judge Prettyman said:

> "The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury

decide the matter. In a given case, particularly one of circumstantial evidence, that determination may depend upon the difference between pure speculation and legitimate inference from proven facts. The task of the judge in such case is not easy, for the rule of reason is frequently difficult to apply, but we know of no way to avoid that difficulty.

"To be valid, the first part of the above-quoted statement from the Hammond case, supra, must be understood to mean that the judge cannot let a case go to the jury unless there is evidence of some fact which to a reasonable mind fairly excludes the hypothesis of innocence. The statement refers to the requisite presence of evidence, and not to the absence or effect of other evidence. The second part of the quoted statement means that if, upon the whole of the evidence, a reasonable mind must be in balance as between guilt and innocence, a verdict of guilt cannot be sustained.

"Although this court has made the statement we have quoted, the rule actually applied has been as we now state it. Thus, in the opinion in the Hammond case, supra, after the quoted sentence, the court went on to say, "In the light of the circumstances we have related, we think it impossible that a jury of reasonable men could have fairly reached the conclusion that appellant, in what he did, necessarily intended to commit rape." And in the Cady case, the court said that the quoted rule "is not applicable here, because the facts established are such that the jury was fully warranted in deducing from them inferences which excluded every other hypothesis but that of guilt."

"If the judge were to direct acquittal whenever in his opinion the evidence failed to exclude every hypothesis but that of guilt, he would preempt the functions of the jury. Under such rule, the judge would have to be convinced of guilt beyond peradventure of doubt before the jury would be permitted to consider the case. That is not the place of the jury in criminal procedure. They are the judges of the facts and of guilt or innocence, not merely a device for checking upon the conclusions of the judge."

Subsequently, in the case of Hiet v. United States,

124 U. S. App. D. C. 314 & nn. 2, 3 and 4 (1966),

this Court, again speaking through Judge Prettyman, stated:

> "Where only circumstantial evidence is involved, it used to be stated that to sustain conviction the proof must negative every hypothesis save that of guilt.[2] But in the Holland case in 1945,[3] the Supreme Court said the better rule is simply to instruct properly on reasonable doubt, and expressed the view that the additional instruction is confusing and incorrect. In the case at bar there was on the evidence in the record a reasonable doubt that Hiet took the property; indeed there was no evidence whatsoever that he took it or carried it away. Without any evidence whatever connecting Hiet with the missing property, I think there is necessarily a doubt (more than a reasonable one, I think) that he took it and carried it away. The doubt is not a visceral or moral one; it is a doubt upon the record; the lack of essential proof creates the doubt as a legal matter. So the judgment must be reversed.[4]

"2. Curley v. United States, 81 App. D. C. 389, 160 F. 2d 229, and cases there cited. cert. denied, 331 U. S. 837, 67 S. Ct. 1511, 91 L. Ed. 1850 (1947); Cady v. United States, 54 App. D. C. 10, 293 F. 829 (1925); Read v. United States, 42 F. 2d 636, 638 (8th Cir. 1930); Gargotta v. United States, 77 F. 2d 977 (8th Cir. 1935).

"3. Holland v. United States, 348 U. S. 121, 139, 75 S. Ct. 127, 99 L. Ed. 150.

"4. Cooper v. United States, 94 U. S. App. D. C. 343, 218 F. 2d 39 (1954); Cephus v. United States, 117 U. S. App. D. C. 15, 324 F. 2d 873 (1963); Campbell v. United States, 115 U. S. App. D. C. 30, 316 F. 2d 611 (1963)."

"Several minor features of the Government's case, not in themselves important, indicate a lack of regard for accuracy on the part of some witnesses and are disturbing to me upon review:

"1. The complainant at first testified in vivid precision that upon noting the condition of his car he went back to the Dodge Hotel, a block away, and asked the desk clerk how to get to the nearest police station. Later he said, "Actually, I never left the car." He then said a companion went to the hotel while he (the complainant) stayed at the car.

"2. The complainant testified that this companion went with him to the police station and the police officer there (an Officer Nenno) looked at his fingers and those of his companion. Officer Nenno testified that the complainant was alone when he came in on the evening in question. Asked, "There wasn't another person?", the officer repeated, "I don't believe there was, sir."

"3. The prosecutor told the court in an opening statement that a police officer would compare fingerprints taken from the car window ("latent prints") with known prints of the defendant taken on February 7, 1965. An officer did testify that he took prints of this defendant on that date, and the prints were introduced as Government's Exhibit No. 2. Another officer testified that he "lifted prints from the car, and these were presented as Government's Exhibit No. 3. Then the witness testified that he compared Exhibits 2 and 3 and that he made enlarged photographs of one finger shown on Exhibit 3 and one on Exhibit 2. But on crossexamination the officer said he actually made his comparison on January 30th (a week before the prints in Exhibit 2 were taken), and he said, "Well, truthfully, we had another previous set of fingerprints with which they were compared." He explained that he had made his comparison with "a previous fingerprint card which we had in our office," but the photograph in evidence was of the print taken on February 7th."

In the instant case, we find, similarly, several minor features of the Government's case which, in and of themselves, do not amount to a glaring inconsistency. However, the sum total of their effect is to cast a long

shadow of doubt on the overall proof. Further, the prosecution failed to call the trial judge's attention to portions of government witness Arvia Lewis' grand jury testimony containing inconsistencies with the witness' trial testimony. As a consequence, the defense was denied an adequate opportunity to crossexamine and impeach the witness. U. S. v. Soblen, 203 F. Supp. 542, cert. denied, 82 S. Ct. 1595, 370 U. S. 944, 8 L. Ed. 2d 810 (D. C. N. Y. 1961).

IV. THE TRIAL COURT ERRED WHEN IT FAILED TO INSTRUCT THE JURY ON THE ELEMENTS OF SECOND DEGREE MURDER, IN VIEW OF THE EVIDENCE AGAINST THE APPELLANT IN THIS CASE.

Appellant Elroy Lewis submits that if, for the sake of argument, the jury might reasonably have found the defendant-appellant Elroy Lewis guilty of the crime of murder, it might further decide the degree of murder could be first or second degree. Therefore, the jury must decide which degree had been permitted, and in these circumstances, the court should have defined both first and second degree murder to the jury, and add that, if they entertained a reasonable doubt as to the degree, they should find the defendant guilty of the lesser crime. Goodall vs. United States, 86 U. S. App. D. C. 149 (1950. In Goodall, the court discussed an instruction such as Elroy Lewis contends should have been given in the instant case. The general rule is given as:

"The appellant also claims error in the District Court's failure to tell the jury that, if they believed him guilty of the killing but had a reasonable doubt as to whether he had been proved guilty of murder in the first degree or murder in the second degree, they should resolve that doubt in his favor and find him guilty of the lesser crime. The court did not in so many words instruct the jury to that effect. The prosecution endeavors to show, however, that the court's charge as a whole, when carefully analyzed, is seen to contain what is tantamount to that admonition. We need not and do not decide whether the government is correct in making that assertion, because we regard the question as immaterial. An instruction such as that which the appellant says should have been given is necessary only when from the evidence as a whole the jury might reasonably find the defendant guilty of either first or second degree murder, and therefore must decide which degree had been committed. In those circumstances it is proper for the court to define both crimes, leaving it to the jury to say which, if either, had been committed; and to add that, if they entertained a reasonable doubt as to the degree, they should find the defendant guilty of the lesser crime."

V. THE TRIAL COURT ERRED IN NOT DECLARING A MISTRIAL IN VIEW OF THE PROSECUTOR'S REMARKS, IN REBUTTAL OF THE DEFENSE ATTORNEY'S FINAL ARGUMENT.

Any jury in a case such as this would listen, with rapt attention, were either or both of the appellants to testify on their own behalf. In this case, of course, neither Elroy nor Bobby Lewis took the stand. Government counsel did not directly refer to the fact that neither of appellants took the witness stand. However, when he indicated that Mrs. Bethea's testimony concerning Bobby and Elroy's presence near Edgewood Liquors was "irrefutable and uncontradicted," he was undoubtedly referring to the fact that neither of the co-defendants took the stand.

While not using the tactic of the prosecutor in Garris v. United States, Criminal Number 21142, U. S. App. D. C., February 14, 1969, where the prosecutor argued facts which the defense kept out by his objections, the prosecutor in the instant case certainly pointed out a fundamental fact that, by indirection, was brought to the attention of the jury: neither of the co-defendants had taken the stand during the trial. This was certainly as prejudicial to the defendants here as the tactic used by the prosecutor in Garris v. United States, Id. and in violation of appellant's Fifth Amendment rights.

VI. THE COURT BELOW COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S MOTION FOR THE APPOINTMENT OF ADDITIONAL COUNSEL.

Appellant Elroy Lewis hereby adopts, by reference and in its entirety, the arguments of counsel for Bobby Lewis pertaining to this point, which is point No. 2 in appellant Bobby Lewis' brief.

VII. POINTS RAISED BY APPELLANT ELROY LEWIS, PRO SE.

The appellant Elroy Lewis has, pro se and in addition to the points raised by his counsel, raised the following additional points on appeal:

1. The Government knowingly used perjured testimony to gain appellant Elroy Lewis' present conviction in Case No. 754-66, based on Mrs. Arvia Y. Lewis' inconsistent statements on April 5, 1966; before the Grand Jury; and at the trial of appellant Elroy Lewis;

2. He was given ineffective assistance of trial counsel, in that his trial counsel failed to require the trial judge to rule on appellant Elroy Lewis' motion to dismiss the indictment, thereby rendering ineffective assistance of counsel, to the point of depriving Elroy Lewis of counsel under the Sixth Amendment and denied him the due process of law and a fair trial under the Fifth Amendment;

3. The trial court abused his descretion in not holding an evidentiary hearing on appellant's motion to dismiss the indictment. (Sen. Tr. 2, 3, 4);

4. The trial court erred when it refused to disclose to appellant the complete background of the jurors and other information available to the government, but not to appellant.

5. The trial court erred when it refused to grant appellant's pro se motion for a coroner's inquest.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,599

ELROY LEWIS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 21,683

ROBERT LEWIS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeals from the United States District Court
for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
VICTOR W. PAYNE,
JOHN G. GRAY, JR.,
Assistant United States Attorneys.

INDEX

TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

I. Whether the police had probable cause to arrest appellants minutes after a violent robbery, where with the aid of three different citizens they pursued the getaway car from the scene, observed it abandoned and confronted appellants walking in an opposite direction less than half a block away?

II. Whether the trial judge properly denied appellants requests for two attorneys apiece in a capital case, where these requests were made for the first time during the fourth day of trial and no reason was proffered or appeared as to why such additional counsel were necessary?

III. Whether the trial judge's finding, that appellants' right to due process was in no way violated by a police identification lineup, is supported by the thorough record airing of the circumstances surrounding this lineup?

IV. Whether the trial judge properly refused to give a second degree murder instruction where he dismissed the charge of premeditated murder and the evidence only pointed to felony murder?

V. Whether there is substance to appellants' remaining assertions of error?

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* This case was not previously before this Court under the same or a similar title.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,596

ELROY LEWIS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 21,683

BOBBY LEWIS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE [1]

By indictment filed May 2, 1966 appellants were charged with felony murder, deliberate and premeditated

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[1] Transcript designations similar to those used by appellant Elroy Lewis are adopted herein. Motion to Suppress (M. Tr.); Trial Transcript (Tr.); Preliminary Hearing before the U.S. Commissioner (PH. Tr.).

murder, robbery, unauthorized use of an automobile and carrying a dangerous weapon. These charges arose out of the robbery of the Edgewood Liquor Store at Fourth Street and Rhode Island Avenue, N.E. and the fatal shooting of its proprietor, Louis Brodsky, on the afternoon of April 5, 1966. Tried by a jury before the Honorable Aubrey E. Robinson, Jr., from October 17 through October 31, 1967, appellant Elroy Lewis was convicted of felony murder, robbery, unauthorized use and carrying a dangerous weapon. On January 5, 1968 he was sentenced to concurrent terms of life, 5 to 15 years, one to three years and four months to one year respectively.

Bobby Lewis was at the same time tried and convicted of robbery, unauthorized use and carrying a dangerous weapon. He was found not guilty of felony murder but received concurrent sentences of 5 to 15 years for robbery and four months to one year for carrying a dangerous weapon and a consecutive sentence of one to three years for unauthorized use.

Motion to Suppress

Prior to trial both appellants moved to suppress certain items taken from or near their persons at the time of arrest.[2] A hearing on this motion took place before the Honorable William B. Bryant on November 18 and 21, 1966.

First Ronald Howard, a resident of the National Training School, testified for the defense. He stated that while walking south on Lincoln Road, N.E. between V Street

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[2] Although the hearing on the motion to suppress did not give specific attention to exactly what items were obtained from appellants at the time of arrest, it appears that among the items sought to be suppressed were a ski-mask, a .45 caliber pistol, a hawk-billed knife, work gloves, approximately eighty-four dollars and a Bank of Commerce envelope containing change taken from Bobby Lewis (M. Tr. 74-75, Tr. 481, 494, 542-4) and a ski-mask, ninety dollars, a green rubber glove and a .38 caliber bullet taken from Elroy Lewis (Tr. 481-2, 488). Also a .38 caliber pistol, the murder weapon, was abandoned by Elroy and seized by the police at the time of arrest (Tr. 483, 723).

and Rhode Island Avenue at 3 o'clock on the afternoon of April 5, 1955, he and three of the Lewis brothers, Carl, Elroy and Bobby were arrested by two uniformed police officers who drove up in a car from the direction of Rhode Island Avenue (M. Tr. 17, 23). These officers were immediately joined by two other officers where upon Ronald and the Lewises were positioned along a nearby car that was being towed, and then they were searched (M. Tr. 24-26). Ronald further stated that he and the Lewises had come into the area to pass out flyers and that they were about 20 feet north of Rhode Island Avenue when confronted by the officers (M. Tr. 28, 30-32).

Officers Jessie L. Anderson and Richard A. Hamilton, members of the Metropolitan Police Department, were presented by the Government. They testified that at approximately 3:01 p.m. on the afternoon in question while in Scout Car 121 they "received a radio run for a holdup and robbery at 4th and Rhode Island Avenue." Speeding to the scene they were advised that the robbery location was the Edgewood Liquor Store in the 2300 block of 4th Street. Approaching the store James Calvin Taylor, a man known to the officers (M. Tr. 79), was in the street "hollering and waving his arms." The officers picked up Mr. Taylor who told them that the robbers were in a green Chevrolet which had just turned into Bryant Street one block north of the liquor store. (M. Tr. 51-52.)

As appellants emphasize there is a conflict in the testimony as to what other details concerning the robbers Mr. Taylor communicated, or could communicate, to the officers during the chase;[3] the following facts, however, are undisputed. Proceeding up Bryant Street the officers observed a man "pointing south". On the southeast corner of 3rd and Bryant they observed a girl pointing south.

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[3] The fact that Mr. Taylor had died prior to the hearing on the motion to suppress prevented this conflict from being resolved. Because it is clear that Judge Robinson adopted appellants' version of these facts in denying the motion to suppress at trial, appellee has refrained from specifying this conflicting testimony in this counterstatement. The testimony of the officers that Taylor did provide other details concerning the robbers is not disregarded and will be alluded to in argument.

Turning south on 3rd Street the officers passed by Adams Street because it permits no outlet without coming back to Bryant. Arriving at Rhode Island they turned west concluding that the get-away car would not have continued south on 3rd Street which becomes one-way north on the opposite side of Rhode Island. (M. Tr. 52.) Speeding west on Rhode Island both officers "observed a green Chevrolet abandoned in the middle of V Street just east of Lincoln Road and the witness (Mr. Taylor) identified that as "the car that left the liquor store." (Tr. 53).

Travelling too fast to turn into V Street the officers proceeded one block further on Rhode Island and were making a right turn into Lincoln Road when they spotted four men on the west side of Lincoln Road half way between Rhode Island Avenue and V Street. Thereupon, the officers stopped, placed the Lewises and Ronald Howard under arrest, searched them and found the items sought to be suppressed (M. Tr. 53-55). This entire sequence of events transpired in four minutes, the radio run being broacast at 3:01, the arrest taking place at 3:05 (M. Tr. 69).

Near the close of this hearing one of the defense counsel noted that a subpeona for the attendance of Mr. Taylor had been returned marked "deceased", and he offered into evidence the testimony of Mr. Taylor at a preliminary hearing before the United States Commissioner (M. Tr. 99-100). The Judge stated that he would read the transcript, if, in fact, Mr. Taylor was dead (M. Tr. 102). By order dated February 27, 1967 Judge Bryant denied the motion to suppress.

Later during the fifth day of trial before the Honorable Aubrey E. Robinson, Jr., the defendants renewed their motion to suppress (Tr. 112-118). Judge Robinson agreed to conduct a limited hearing on the motion indicating that he was thoroughly familiar with the transcript of the motion to suppress (Tr. 118). Officer Hamilton again testified and portions of Mr. Taylor's preliminary hearing testimony was read with a view toward showing that Taylor could not identify the robbers (Tr. 129). Thereupon the

court found probable cause for arrest even assuming Taylor could not identify the robbers and denied the motion to suppress (Tr. 1133-35).

Stovall Hearing

The second day of trial was devoted to a hearing out of the presence of the jury to determine whether the lineup attended by three Government witnesses on the afternoon of the crime was in any way violative of due process. (Tr. 80-169C.) Three police officers who had been present at the lineup and two proposed Government witnesses testified. The lineup consisted of seven persons, the four robbery suspects and three others. The men were permitted to pick their positions in the lineup (Tr. 85), and were paraded onto the lighted stage area, in single file. Each of the seven in turn stepped forward and said "Keep your mouth shut or I'll shoot you?" (Tr. 86). A photograph was taken of these men in their respective lineup positions in an anteroom immediately after they left the stage. This photo was available at the hearing and at trial. (Tr. 88-89.)

The lineup audience consisted of the witness, Mrs. Warren, Mr. and Mrs. Lewis and Detectives Wallace and Wilson. All three witnesses naturally knew there had been a holdup and shooting and knew that arrests had been made (Tr. 127, 146). They also had been requested to give statements as to what they had witnessed prior to the lineup (Tr. 147). The police told the witnesses only that they were going to view a lineup to see if they could identify anyone (Tr. 129, 132, 147). At no time prior, during or after the lineup had Mrs. Warren discussed the case with Mr. & Mrs. Lewis (Tr. 135, 139) nor could the Lewises overhear Mrs. Warren's identification or vice versa (Tr. 136, 160-161). There is no indication that the witnesses saw any of the seven men at headquarters prior to their exhibition on the stage.

Mrs. Warren identified lineup subjects Nos. 2 and 3 (the appellants herein), No. 2 being the one who threw the gun in the towed car (Tr. 139; see 723, 728). One

and one half years after the lineup Mrs. Lewis could not remember whom she had identified.[4] It appeared that Mr. and Mrs. Lewis had a difference of opinion over one of the subjects (Tr. 155) but the trial judge satisfied himself that any identification was the result of the witnesses' independent judgment and not the suggestion of anyone else (Tr. 168-69).

Thereupon Judge Robinson found no "suggestibility" that tained the lineup identifications so as to deprive the defendants of due process (Tr. 169B) and testimony both as to lineup and in court identifications was permitted.

Trial Before the Jury

The Government's case in chief consisted of the testimony of some 25 witnesses and 50 exhibits. That evidence is very briefly summarized as follows:

The Deputy Coroner of the District of Columbia testified that on the afternoon of April 5, 1966 he went to the Edgewood Liquor Store at 2303 4th Street, N.E. and found the body of a man whom he pronounced dead. Having performed an autopsy he indicated that the man had been shot in the chest three times at close range. He recovered three .38 caliber slugs and fixed the time of death at 3 p.m. (Tr. 47-52, 58.)

After the son-in-law and brother-in-law of the deceased had identified the body as that of Louis Brodsky (Tr. 4, 5), the decedent's wife stated that on April 5, 1966, she went to her husband's store about 11 a.m., did some bookkeeping, went to a nearby bank and left for home at 2 p.m. (Tr. 7, 40). She identified a manila envelope containing change with "1.00" marked on the outside as having been at the store when she left April 5, 1966. (Tr. 9-10.) This envelope was later shown to have been found in the possession of appellant, Bobby Lewis, when arrested that afternoon (Tr. 542). Mrs. Brodsky also stated that $160 or $170 in cash was missing from the store (Tr. 13).

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[4] Later before the jury Mrs. Lewis' memory was refreshed with her April 5, 1966 statement that she identified Nos. 2 (Elroy), 4 and 7 and she so testified (Tr. 226-227).

Mr. and Mrs. Alonzo Lewis and shortly before them Mable Bethea walked down 4th Street, N.E. just prior to 3 o'clock on the afternoon of the murder and saw three men sitting in a bluish green Chevrolet just north of the Edgewood Liquor Store (Tr. 72, 400). Mrs. Bethea also saw two men outside the car wearing ski-masks on their heads but not over their faces. She positively identified these men as the appellants. (Tr. 402-403.) Mr. and Mrs. Lewis were entering the liquor store to buy a newspaper when a man wearing a ski-mask and carrying a gun emerged from the store and told them to get back or he would shoot. Then the man went over to the car and returned to the store. (Tr. 73-74.) After the robbers left the Lewises entered the store and saw change and papers scattered on the floor and Mr. Brodsky lying in the back (Tr. 75). The Lewises identified three of these men by their "size" later that afternoon at the lineup discussed *supra*. Both identified Elroy as one of the men (Tr. 180, 227); neither identified Bobby.

Mrs. Essie Footman, wife of Willie Footman, half brother to appellants, testified that on the morning of the robbery she was visited by Bobby and Elroy. During the visit she was out of their presence for 20 minutes (Tr. 326-328). Later that night upon hearing of the robbery she looked for her husband's gun usually kept under the mattress. It was missing (Tr. 330). Then Mr. Footman identified his .45 caliber pistol as the one taken from Bobby Lewis incident to his arrest minutes after the robbery (Tr. 342, 485).

Harold Langley, a cab driver, picked up appellants in Northeast Washington about noon of the eventful day. At their request he took them to a gun shop in Hyattsville, Maryland. They returned to his cab with two boxes which were marked with the respective notations "Colt .45" and ".38". He returned them to 11th and H Streets, N.E. at 12:41 p.m. (Tr. 375-379).

Privates Hamilton and Anderson testified to substantially the same events that led them to arrest appellants on Lincoln Road at 3:04 p.m. They further stated that

upon making their arrest they lined the men up against a car that was being towed by a police crane and searched them. They took a red ski mask (Tr. 481) a .45 caliber pistol (Tr. 485, 520) a linoleum knife (Tr. 523) about $80 in crumpled bills (Tr. 586-7) and the manilla envelope of change (Tr. 542) from Bobby Lewis and a black ski mask, about $90 in cash and a live .38 caliber shell from Elroy Lewis (Tr. 480-486).

Julia G. Warren who lived on the second floor of the building on the corner of Lincoln and Rhode Island Avenue heard the commotion made by the arrest below (Tr. 720). Looking out the window she saw the arrested Elroy Lewis up against the towed car. He furtively took a gun from his midsection, opened the car door and threw it inside (Tr. 721-3). She ran down stairs and notified one of the many officers on the scene by this time. Officer Hamilton recovered a .38 caliber pistol from the floor of the towed car near where Elroy was standing. The gun contained three empty cartridges (Tr. 511-513). A ballistics expert from the F.B.I. later certified that this was the murder weapon (Tr. 832).

Herbert Wood testified that on the morning of April 5, 1966, he had parked the bluish-green Chevrolet he owned at 6th and L Streets, N.E. Later that day in the course of his employment "between 12 and 12:30" he passed the car where he had parked it; however, upon finishing work at 2:45 p.m. the car was gone. At 5 p.m. that afternoon at police headquarters he claimed the car used in the Edgewood Liquor Store robbery as his. He had given no one permission to drive the car that day. (Tr. 304-306.)

All of the evidence taken from appellants at the time of arrest was admitted into evidence (Tr. 915-919) and both appellants stipulated that they did not possess a license to carry a gun (Tr. 921). Neither of the accused testified or presented any witnesses in their defense.

SUMMARY OF ARGUMENT

I.

Even assuming, as did the trial judge, that the witness, Calvin Taylor, could provide no details concerning the description of the robbers, it is undisputed that he positively identified the abandoned getaway car. In the light of this and their hot pursuit it was reasonable for the officers to believe appellants had committed the crime by virtue of their proximity to the getaway car and their walking away from the car along the only likely escape route permitted by the physical features of the locale.

Additionally, appellee submits that the testimony of police officers that Taylor partially described the robbers during the chase is not essentially contradicted by Taylor's testimony prior to his death and that said police testimony may be considered an element of probable cause.

II.

Title 18 U.S.C. § 3005 provides an accused the right to be represented by two lawyers in an capital case. However, when this right is asserted for the first time during the fourth day of trial and no reason appears or is proffered in support of this request, it is properly denied.

III.

An accused's right to due process is violated through an identification only when the surrounding circumstances are impermissively suggestive so as to bring about the likelihood of misidentification. Here a thorough airing of the circumstances surrounding the lineup took place and the judge satisfied himself that all identifications were the product of the witnesses' independent recollection.

IV.

A second degree murder instruction is only appropriate where the evidence will support a conviction for such. Here the evidence that established the robbery was neces-

sary to convict these appellants of murder. Thus there was no possibility of a murder conviction exclusive of the felony and the requested second degree instruction was properly denied.

V.

The record on the whole provides little support for appellants' remaining points and they are accordingly answered briefly.

ARGUMENT

I. The arrest of appellants less than one half block away from the abandoned getaway car minutes after a violent robbery was based upon probable cause.

(M. Tr. 30, 31, 35, 51-53, 61, 91, 83; PH. Tr. 29-30, 35-37, 41, 53; Tr. 501, 1131)

Appellants' sole Fourth Amendment contention is that Officers Anderson and Hamilton did not have probable cause to arrest them on Lincoln Road [5] minutes after the robbery of the Edgewood Liquor Store. Appellee disagrees.

This Court is well aware of the meaning of probable cause. It "is a plastic concept whose existence depends on the facts and circumstances of the particular case." *Bailey* v. *United States*, 128 U.S. App. D.C. 354, 389 F.2d 305, 308 (1968). Its substance "is a reasonable ground for belief of guilt" dependent upon "the practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar* v. *United States*, 338 U.S. 160, 175 (1949). Thus, as in all Fourth Amendment claims, the essential inquiry for this Court is the *reasonableness* of the police conduct (*United States* v. *Rabinowitz*, 339 U.S. 56, 60 (1950)); and the determina-

[5] At the outset appellant Bobby Lewis' map-appendix depicting the area of arrest is erroneous in one respect. It purports to show a road north of V Street running east from Lincoln Road. While there is a small alley in that location, *there is no such Road.*

tion of "[r]easonableness involves consideration of the nature of the police conduct as well as the occasion of its exercise." *Dorsey* v. *United States*, 125 U.S. App. D.C. 355, 357, 372 F.2d 928 (1967).

A. *The physical proximity and direction of appellants in relation to the abandoned getaway car made the arrest by the pursuing police officers reasonable.*

Reviewing, as we must, the facts known to Officers Hamilton and Anderson at the moment of the arrest at issue,[6] we find that the occasion of the police activity was the report of a robbery, a crime of violence (usually armed violence) at the Edgewood Liquor Store.[7] On the scene in moments and confronted by Mr. Taylor "hollering" and "waving his arms", the officers were reasonably certain the reported felony had in fact been committed, regardless of what Mr. Taylor was able to tell them.[8]

There is no dispute that upon entering the scout car Taylor told the officers he had seen the robbers speeding off in a green Chevrolet turning left at Bryant Street (PH. Tr. 30). Then the action of the man in the middle of the block on Bryant Street and the girl on the southeast corner of 3rd and Bryant (M. Tr. 52) corroborated Mr. Taylor, and assured the officers both that their pursuit was the hottest, and that they were following the precise

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[6] "Probable cause is not to be viewed from a remote vantage point of a library, but rather from the viewpoint of a prudent and cautious police officer on the scene at the time arrest." *Jackson* v. *United States*, 112 U.S. App. D.C. 260, 262, 302, F.2d 194, 196 (1962).

[7] While only the approximate address (4th and Rhode Island Avenue) was contained in the initial report, the officers learned of the specific address as they sped to the scene (M. Tr. 51).

[8] It is the firm position of appellee that probable cause for arrest existed even assuming Taylor could do nothing more than report and identify the Green Chevrolet. That Taylor provided the police with more details concerning the robbers is discussed infra p. 15.

escape route.[9] Thus directed, the officers pursued the only logical path open to escaping felons (M. Tr. 52),[10] and soon spied the green Chevrolet on V Street, the first available egress from Rhode Island Avenue less than four blocks west of the liquor store.

From their bare observation of the car parked, as it was, in the middle of V Street, the officers had cause to believe they were closing in on the robbers, but they could have no doubt when Taylor pointed out the vehicle as the car he had seen leaving the liquor store (PH. Tr. 31, 35, M. Tr. 53). As they passed V Street it could be seen that the car had been abandoned and turning into Lincoln Road they confronted appellants and their companions.[11]

Lincoln Road, N.E. between V and Rhode Island comprises a very short distance. It is fairly described as less than half a city block. "No more than 25 or 30 yards" (Tr. 501). The officers could see that the car at the Lincoln Road end of V Street was abandoned. They thus knew the robbers would be on foot. And finally appellants were just across the street walking away from the green Chevrolet.[12]

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[9] The fact that three different citizens independently directed the police officers after the getaway car obviated the need for a showing of underlying circumstances which appellants complain were not present during the chase.

[10] The likelihood of the escape route and the logic of the decisions of the driver of the scout car, Officer Anderson, are illustrated by the map-appendix to Bobby Lewis' brief. Third Street cannot be entered proceeding south across Rhode Island Avenue, N.E. Neither can left turns be made from Rhode Island Avenue.

[11] Pedestrian traffic on Lincoln Road north of Rhode Island Avenue is light. The preliminary hearing transcript, relied upon by appellants, reasonably infers there was no one else in the area of the abandoned car (PH. Tr. 41):

> DEFENSE COUNSEL: Now tell me this: were there many people around at the time?
> MR. TAYLOR: No, not right at that time.

[12] Indeed the physical characteristics of the location of the arrest (well known to these officers of the 12th Precinct) almost compelled the conclusion that fleeing robbers on foot would head back to Rhode Island. Because of Glenwood Cemetery, the north side of V Street

Only with the above sequence of events in mind did the officers make their arrest. It was no mere accident that these men turned out to be the robbers. All of the probabilities pointed in their direction. If, as appellee feels is the law, probable cause depends upon probabilities and practicalities of the situation as they appear to prudent cautious and trained police officers (*Chappell* v. *United States*, 119 U.S. App. D.C. 356, 342 F.2d 935 (1965)), the arrest of these men in such close proximity to the getaway car clearly measured up to the Fourth Amendment standard.

This was not an arrest for investigation on mere suspicion as appellants allege (Bobby Br. 20-31).[13] Through hot pursuit the police had firmly linked the green Chevrolet with the holdup. Nor was this an arrest remote from the scene on unspecified information as in *Beck* v.

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to the west and the west side of Lincoln Road to the north are barracaded by a high wall. V Street, which affords no convenient outlet on North Capital because of an udnerpass, has a solid bank of row houses on its south side. For the most part Lincoln Road has stone walls or hedges on its east side and it can be viewed for quite a distance to the north from the point of arrest. Furthermore there is no indication that anyone else could be seen in the area at the time of arrest. (See Tr. 498).

Again, note the testimony of Mr. Taylor as to the location of appellants group in relation to the car.

> (PH. Tr. 30)
>
> * * * Well I didn't actually see 'em get out of the car, but I did see 'em when they entered the curb, * * *
>
> (PH. Tr. 35)
>
> A. They was just entering the curb coming across the street, sir.

These statements to the effect that appellants' were just crossing the street from the car appear twice more at PH. Tr. 36 and 37. We submit the connection of appellants' group with the car was obvious.

[13] *Gatlin* v. *United States*, 117 U.S. App. D.C. 123, 326 F.2d 666 (1963), heavily relied upon by appellants, has recently been distinguished by Judge Wright in *Bailey* v. *United States*, 128 U.S. App. D.C. 354, 358, 389 F.2d 308, 309 (1967) as "a round up of innocent suspects." Here where the arrest occurred four blocks west of the robbery four minutes later there is, like in *Bailey*, "no suggestion" of such a round up.

Ohio, 379 U.S. 89 (1964) relied upon by appellants. The probabilities were extremely high that any men within half a block of the abandoned car and walking away from it were the felons. "Much less evidence than is required to establish guilt is necessary" for a valid arrest. *Bailey* v. *United States*, *supra*, 128 U.S. App. D.C. at 357, 389 F.2d at 309. *Draper* v. *United States*, 358 U.S. 307, 311-312 (1959).

In *Bailey*, *supra* the arresting officers knew only that the robbers were three in number and had fled in a 1953 or 1954 blue Chevrolet. Yet with no significant information other than two observations of a blue 1954 Chevrolet heading away from the scene at distances of 3.7 and 6 miles, the arrest taking place 6 miles distant and forty minutes after the crime was upheld as based upon probable cause.[14]

Unlike in *Bailey*, here there was no doubt about the getaway car and the arrest of the men walking away from the immediate proximity of that car a few blocks distant and a little over four minutes after the crime can only be termed more reasonable "efficient police conduct" than that approved in *Bailey*.

Moreover, no illegality can be inferred from the fact that the police emerged from their scout car with guns drawn. A robbery implies armed offenders. Extraordinary action is called for by extreme or exigent circumstances. *Warden* v. *Hayden* 387 U.S. 294 (1967) (entry and search of a home permitted in hot pursuit of a robber minutes after offense). And police officers have every right to protect themselves from those they believe armed and dangerous. *Terry* v. *Ohio*, 88 S.Ct. 1868 (1968).

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[14] The additional information available in *Bailey* that the felons were Negro and three in number could be of very little value to the police in the light of the facts that the arrest took place at 14th and C Streets, N.E. and there were four not three men in the car when stopped.

Similarly the observation of the stolen wallet by the police does not serve to distinguish *Bailey*, the majority having held that the arrest occurred as the police officers approached the car.

B. *The alleged conflict of testimony is not established by the record.*

Appellants' argument is wholly grounded in the fact that Mr. Taylor's only sworn testimony prior to his death indicates that he could not identify the robbers prior to their arrest (Tr. 30). At first glance this would seem to conflict with testimony of Officers Anderson and Hamilton to the effect that Taylor told them the sex, race and approximate number of the robbers during the chase (M. Tr. 53, 61, 91, 93); however, it must be remembered that the hearing before the commissioner was to determine whether there was probable cause to hold these men on charges of robbery and murder, and no specific attention was given to the legality of their arrest. Nowhere during the preliminary hearing was Taylor asked what he had said to Officers Anderson and Hamilton prior to arrest. He testified that he personally could not identify the men, but this is quite different from saying that he had received no descriptive details of them. Indeed the transcript provides the inferences that Taylor was very likely aware of the sex, number and race of the robbers (PH. Tr. 29):

> MR. TAYLOR: This lady and gentlemen came running into the shop there and asked to call the police, that the liquor store was being held up.
>
> Q. What action did you take?
>
> A. I started running to the store and she said, "No mister. They got guns out there."

It goes against human experience to argue both that Mr. and Mrs. Lewis did not communicate these details to Mr. Taylor that he did not in turn communicate them to the police. In fact Mr. Taylor's police statement that he had pointed out the group to the officers saying "that's them" (See Tr. 1131) can be construed as his pointing to a group that fit the limited knowledge he possessed concerning the robbers. Mr. Taylor was not the most articulate of witnesses.

Appellee feels that this Court like Judge Robinson can find ample probable cause, even assuming Mr. Taylor

could provide no details other than the identity of the car. We have discussed the testimony before the U.S. Commissioner to show the precise nature of the "conflict" here asserted. In upholding the arrest Judge Bryant considered Mr. Taylor's testimony, but the record does not show what part, if any, it played in his ruling. We submit that the police testimony to the effect that they were given a partial description is essentially uncontradicted; although, we believe it strictly unnecessary to the legality of appellants' arrest, this Court can and should consider such an element of the cause for appellants' arrest.

II. Appellants' motions for additional counsel initially made after 3½ days of trial were untimely, unfounded, and properly denied.

(Tr. 325)

Both appellants assert error on the basis of 18 U.S.C. § 3005 quoting *Smith* v. *United States*, 122 U.S. App. D.C. 300, 307, 353 F.2d 838, 845 (1965) to the effect that this statute provides an absolute right to two counsel in a capital case. While perhaps meritorious on its face, this argument fails completely when the Court's attention is directed to the fact that additional counsel was first requested during the noon recess on the fourth day of trial.

Judge Wright's language in *Smith* v. *United States*, *supra* was directed to the facts of that case.[15] Appellee feels that of the few appellate constructions of 18 U.S.C. § 3005 the Sixth Circuit case of *United States* v. *Davis*, 365 F.2d 251 (1966) is the most apposite to the situation at hand. (365 F.2d at 254)—

> We construe the words "as he may desire in § 3005 to do nothing more than to confer upon the defendant

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[15] In the sentence before characterizing § 3005 as an "absolute right", Judge Wright said that had Cunningham's request been for additional counsel rather than the replacement of counsel his request would have to be honored. It must be noted that in *Smith* Cunningham's motion for additional counsel was made "ten days before his trial" (122 U.S. App. D.C. at 306, 353 F.2d at 844).

> in a capital case *the option* of whether one attorney or two attorneys will be appointed to represent him. [Emphasis added]

Like any change in counsel this matter rests within the sound discretion of the trial judge. *Cf. United States* v. *Fiorillo*, 376 F.2d 180, 185 (2nd Cir. 1967); *Smith* v. *United States*, *supra*, 122 U.S. App. D.C. at 307, 353 F.2d at 845. Here there is not even any allegation that appellants were not informed of their right to two lawyers; and appellants had declined to take advantage of § 3005 in the intervening 1½ years between their arrest and trial.[16]

It is submitted that the trial judge cannot be deemed to have abused his discretion in these circumstances. To have appointed another lawyer during the noon recess—assuming one could be found—would have done nothing but add a "warm body" to the defense table. To have postponed the trial to enable additional counsel to become informed on the many facts and technical issues already in the case would have seriously disrupted the administration of justice. As the Second Circuit said of an analogous situation in *United States* v. *Llanes*, 374 F.2d 712 (1967) at 717:

> We and other courts of appeals have repeatedly made it clear that the right to counsel "cannot be * * * manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice." (Citing cases) Judges must be vigilant that requests for the appointment of a new attorney on the eve of trial should not become a vehicle for achieving delay. [Citing *Cleveland* v. *United States*, 116 U.S. App. D.C. 188, 322 F.2d 401, *cert. denied*, 375 U.S. 884 (1963).]

Additionally the fact that below the defendants were brothers made them less likely to possess the adverse interests found in other co-defendants. Thus as a practical

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[16] Appellants' arrest took place April 5, 1966; their trial commenced October 16, 1968 and additional counsel was requested October 23, 1968.

matter,—for the most part—each brother reaped the benefit of his co-defendant's counsel's efforts in addition to those of his own counsel.[17]

III. The claimed violation of due process at lineup is refuted by the record.

(Tr. 80-169C, 180, 187, 227)

Stovall v. *Denno*, 388 U.S. 293 (1967) holds that—

> A claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it * * *. (388 U.S. at 302).

See also *Simmons* v. *United States*, 390 U.S. 377 (1968) which holds that reversal on these grounds will only take place when

> the identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. (390 U.S. at 384).

Appellee feels that the thorough record airing of all the circumstances surrounding the lineup below (Tr. 80-169C) must lead this Court to affirm Judge Robinson's finding of no impermissive suggestibility. We deem it appropriate, however, to point out the ethereal nature of the specifics upon which Elroy Lewis bases his *Stovall* claim (Br. 24).

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[17] Apparently the feeling of Bobby Lewis on appeal that the mere length of this capital case illustrates prejudice *per se* (Bobby Br. 23 fn. 17) was not shared by trial counsel. It was the defendants and not their attorneys who made the request for additional counsel and when the judge sought reasons for the motion these lawyers could say only that it was their client's wish (Tr. 325).

The statements of Elroy Lewis at Tr. 490 and 732 clearly indicate that the defendants desired new counsel and not additional counsel. *Smith, supra* expressly dealt with this situation: (122 U.S. App. D.C. 307, 353 F.2d at 845 when it said "Dissatisfaction with appointed counsel was not the concern of Congress at the time it enacted 18 U.S.C. § 3005."

The charge (Elroy Br. 25) that prior to lineup the police discussed the evidence against appellants in great detail in front of the involved witnesses is by appellant's own admission totally unsupportable. (Elroy Br. 24: "Although appellant has no record * * *.") Further it is only practical and efficient police procedure to interview and take statements from witnesses while their memories are fresh.[18] Then certainly no negative inference arises from the three witnesses being carried in two police cars from the scene to the locus of the lineup. Fresh identifications are clearly favored. *Wise* v. *United States*, 127 U.S. App. D.C. 279, 383 F.2d 206 (1967).

It is charged that Mrs. Warren was "scared of the Lewises" and thus the objectivity of her identification at lineup is called into question. The only testimony to this effect was that of Detective Wallace, clearly referring to Mrs. Warren's emotional state at the scene of the arrest immediately after she had seen Elroy with the pistol which the police had *not* seen. (Tr. 99.) This articulate witness was not referring to her condition during the lineup.

Finally, while it seems there was some discussion during the lineup between Mr. and Mrs. Lewis as to the identity of lineup suspect No. 4 (neither of the appellants) (Tr. 55), the judge was scrupulous to satisfy himself that the ultimate conclusions of the witnesses were the product of their independent memory (Tr. 155, 168, 169). In any event possible suggestivity could taint only the identification of lineup suspect No. 4. Both Mr. and Mrs. Lewis independently and without discussion identified Elroy (No. 2) as a member of the robbery team (Tr. 155, 180, 187, 227).[19]

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[18] The advisability of such action is vividly borne out by the 1½ year delay between the date of the crime and trial.

[19] Appellant's statement (Elroy Br. 8) that the confusion noted at Tr. 155 was over the man on the driver's side is erroneous. The exact words of Mrs. Lewis were, "It was the one sitting by the door that we had the difference of opinion about." (Tr. 155). Tr. 227 makes it clear that the phrase "man by the door" was used in contradistinction to the driver, about whom there was no disagreement.

IV. The trial judge properly refused to instruct the jury as to second degree murder where he dismissed charges of premeditated murder and the evidence could not support a conviction for second degree murder independent of the robbery.

(Tr. 1218, 1267-1268, 1279)

Elroy Lewis further asserts error because of the trial judge's refusal to charge the jury with regard to second degree murder (Tr. 1218). In thus contending he relies solely upon *Goodall* v. *United States*, 86 U.S. App. D.C. 148, 180 F.2d 397, *cert. denied*, 339 U.S. 987 (1950), but even the section of that decision which appellant quotes (Elroy Br. 32) tenders no support for his argument on the facts at hand. There the Court said (86 U.S. App. D.C. at 151, 180 F.2d at 400):

> An instruction (on both first and second degree murder) * * * is necessary only when from the evidence as a whole the jury might reasonably find the defendant guilty of either first or second degree murder, and therefore must decide which degree had been committed.

There the defendant entered a drug store and pointed a pistol at the druggist saying, "Dr. Johnson, this is a holdup". When the druggist turned and ran the bandit shot and killed him. In roundly rejecting the exact contention made here that Court said, "All the testimony as to what occurred at the drug store pointed to murder in the first degree and nothing else." (86 U.S. App. D.C. at 151, 180 F.2d at 400).[20] While the murder evidence here was circumstantial rather than direct, it too pointed only to felony murder "and nothing else."

Appellant asserts that malice may be inferred from the firing of three shots into the victim from close range. The

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[20] The Court then went on to consider and refute the propriety of a second degree instruction on account of evidence that defendant had been drinking and thus lacked the specific intent requisite for robbery. Here there is no such factor tending to negate any element of robbery while leaving the elements of murder. *Cf. Jackson* v. *United States*, 114 U.S. App. D.C. 181, 313 F.2d 572 (1962).

precise question here, however, seems to be not so much whether each and every element of second degree murder could be found on the evidence, but whether any murder could be found *without finding robbery.* A significant quantum of the Government's evidence was possession of the fruits of the robbery by the defendants minutes after the killing. It was this circumstance of the completed robbery coupled with the defendants' preparations for robbery that placed Elroy on the scene at the time of the shooting and attributed to him a motive for the killing.[21] Given the facts of the death of Louis Brodsky and Elroy's possession of the murder weapon, the robbery evidence was still necessary to permit the murder count to go to the jury.

In *Fuller* v. *United States*, No. 19,532 (September 26, 1968), this Court sitting *en banc* considered the related, but quite different, question of the propriety of instructions permitting guilty findings of both felony murder and second degree murder as to the same crime. Such an instruction was permitted absent request that the second degree count be stricken by the defendant. In the course of its lengthy decision the majority referred to the issue here presented as follows (slip opinion 16):

> The point that second degree murder is a lesser included offense of first degree felony-murder is not negatived by the fact that in some cases a charge of second degree murder may not properly by demanded by the facts. That charge is appropriate *only* when on the facts of the case the jury may consistently find the defendant both innocent of felony-murder and guilty of second degree murder. [Emphasis supplied.][22]

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[21] In making this argument appellee, of course, does not equate the evidence of robbery with the evidence of murder. As the judge's instruction made clear the jury could have convicted of robbery without convicting of murder (Tr. 1279).

[22] As support for this proposition the Court cited *Coleman* v. *United States*, 111 U.S. App. D.C. 210, 220-21, 295 F.2d 555, 565-

The *Fuller* opinion then went on to say that this rule is merely a restatement "of the general federal rule that lesser included offenses may be charged only when the jury may consistently find the defendant innocent of the greater and guilty of the lessor included offense". *Sansone* v. *United States*, 380 U.S. 343, 349-50 (1965).

Here the trial judge twice instructed the jury that should they return a not guilty finding as to count three (robbery), they must return a finding of not guilty as to count one (felony murder) (Tr. 1267-8). Simply stated, if the jury had a reasonable doubt concerning Elroy's participation in the robbery, they would necessarily have one as to his participation in the murder.

V. Appellants' remaining points are insubstantial.

(Tr. 274-275, 398, 403, 1094, 1392)

A. *There is no showing that the trial judge abused his discretion in refusing to grant Bobby Lewis' request for a separate trial.*

The sole record indication that Elroy Lewis misbehaved in the presence of the jury is the apology of his counsel (at the bench) for Elroy's staring at a witness (Tr. 1094).[23] The transcript makes it clear that this apology was not occasioned by an open-court reprimand but by comments of the judge made *in chambers*. Indeed this conduct of Elroy could not have been very obvious. Note the prefatory remark of Bobby Lewis' counsel when he requested a separate trial (Tr. 1094):

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55 (1961) (*en banc*), *cert. denied*, 369 U.S. 813 (1962). *Green* v. *United States*, 95 U.S. App. D.C. 45, 48, 218 F.2d 856, 859 (1955); *Goodall* v. *United States*, *supra* 86 U.S. App. D.C. at 151, 180 F.2d at 400.

[23] All of Elroy's attempts to dismiss his attorney, try his own case, and indict the Court for conspiracy occurred out of the jury's presence. It is reasonably argued that it was the cumulative effect of those incidents that led the judge to characterize his conduct as "generally contemptible" on the occasion of his staring.

> MR. ALTO: * * * Your Honor, I wasn't aware of your observations or the Court's concerns you related that the defendant Elroy Lewis has been sneering and has behaved generally contemptibly, * * *

It is hard to believe that the jury could have derived much of a negative impression from conduct unnoticed by counsel at the same table.

Here the same indictment charged identical offenses arising out of a single incident. Thus a joint trial was properly held pursuant to Rules 13 and 8(b) Fed. R. Crim. P., "[R]ules designed to promote economy and efficiency." *Daley* v. *United States*, 231 F.2d 123, 125 (1st Cir. 1956). Only when the trial judge determines that a defendant will be prejudiced must separate trials be granted, Rule 14, Fed. R. Crim. P. "And the application of this rule to a particuar set of circumstances rests in the sound discretion of the trial judge." *Brown* v. *United States*, 126 U.S. App. D.C. 134, 139, 375 F.2d 310, 315 (1966).

Indeed, the facts of the only two cases cited by appellant in this regard clearly illustrate that Elroy's conduct did not dictate separate trials. In *Brown*, *supra*, one of three defendants threw a fit in the presence of the jury apparently to bolster his insanity defense. A five day delay of trial ensued to permit psychiatric examination. This Court held the conduct to provide "no significant basis" for assuming that either of the other two defendants were adversely affected. More noteworthy is the pertinent holding of *United States* v. *Bentvena*, 319 F.2d 916 (2nd Cir. 1963). There, where fourteen men were jointly tried, one defendant climbed into the jury box pushing jurors and screaming vilifications at them, and another hurled the witness chair at the prosecutor during cross examination. Thereupon both perpetrators were gagged and shackled;[24]

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[24] The fact that there were three Marshals behind the defendants during trial adds nothing to this argument. Such is the usual station of U.S. Marshals during criminal trials. This location is designed to prevent outbreaks of violence such as the throwing of water pitchers. See e.g. *Rollerson* v. *United States*, No. 21,616 D.C. Cir. (November 26, 1968).

but the incidents were held to be no cause for reversal (319 F.2d at 916).

Here the failure of the judge to instruct the jury to ignore Elroy's conduct,[25] points not to abuse of discretion, but to the insignificance of that conduct.

B. *Minor inconsistencies in Government testimony were to be expected 1½ years after the crime and the case was properly submitted to the jury.*

Basic human experience teaches that minor discrepancies will usually be present when two or more persons describe one or a series of events. One and one-half years after those events even more discrepancy can logically be anticipated. *Bynum* v. *United States*, No. 20,980, D.C. Cir. (November 12, 1968). Elroy Lewis recognizes that such discrepancy is acceptable in any criminal trial (Elroy Br. 26) but still argues that the cumulative effect of "several minor features" of the Government's case should have prevented submission of the issue of guilt to the jury.

Here the great weight of consistent Government testimony as to appellants' preparation, presence on the scene and possession of stolen goods and murder weapon minutes after the crime leaves no room even to speculate concerning a reasonable hypothesis of innocence.[26] Indeed the absence of these "minor inconsistencies" would arguably present a stronger issue for appeal.[27]

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[25] It does not appear that such an instruction was even requested.

[26] Appellee fails to appreciate the charge (Elroy Br. 26) that because the Government failed to call the judge's attention to a discrepency in Mrs. Lewis' grand jury testimony the defense was denied an adequate opportunity to cross examine. The grand jury minutes were made available to the defense (Tr. 274-275).

[27] Once there is sufficient evidence to go to the jury, it is the jury which weighs the contradictory evidence and inferences and draws the ultimate conclusion as to facts. *Cf. Continental Co.* v. *Union Carbide*, 370 U.S. 690, 700-701 (1962).

C. *The evidence taken as a whole enabled the jury to infer beyond a reasonable doubt that Bobby Lewis was guilty of unauthorized use of an automobile.*

Bobby Lewis dismembers the evidence viewing it in bits and snatches in order to argue that no evidence placed him in the stolen greenish-blue Chevrolet, even as a passenger (Bobby Br. 24). Such comparmentalization of evidence is improper. *Cf. Continental Co.* v. *Union Carbide*, *supra*, fn. 27; *United States* v. *Patten*, 226 U.S. 525, 544 (1913).

Like the evidence of robbery the evidence of unauthorized use here was for the most part circumstantial. Bobby Lewis was seen shortly before 3 o'clock in the vicinity of both the stolen car and Edgewood Liquors (Tr. 398-403). It was only through a hectic pursuit of the stolen car that the robbers of the store were traced. At 3:05 p.m. Bobby was arrested less than ½ a block from the car and the fruits of the robbery found in his possession. Without further restatement of the evidence linking Bobby to the robbery scheme, of which the theft and use of the green Chevrolet were an integral part, appellee submits there was ample evidentiary basis from which the jury could draw the inference of Bobby's guilt on this count.

D. *The prosecutor's rebuttal argument provides no basis for claiming error.*

Elroy Lewis characterizes the prosecutor's describing Mrs. Bethea's testimony as "irrefutable and uncontradicted" as a comment upon appellants' failure to take the witness stand. Appellee submits that even taking these words at face value only the most strained interpretation permits such a conclusion. Taken in context appellants argument fails completely.

This was a rebuttal to vigorous closing arguments by two counsel who laudibly strove to focus the jury's collective mind on every possible inconsistency and contradiction in the Government's case. Closing argument for both Elroy and Bobby treated Mrs. Bethea's testimony, but with less force than certain other Government testimony.

In these circumstances the comment was not only proper but arguably necessary. The very worst that can be said is that it constituted fair rejoinder. *Cf. Babb* v. *United States*, 351 F.2d 863, 867-868 (8th Cir. 1965). *United States* v. *Heitaus*, 377 F.2d 484, 486 (3rd Cir. 1967).

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgments of the District Court should be affirmed.

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